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10612—33——1

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 31

UNITED STATES OF AMERICA, PETITIONER

v.

F. H. REILY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law appear at Record, pp. 47–48. The opinion of the Circuit Court of Appeals (R. 56) is reported in 62 F. (2d) 621.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 23, 1932 (R. 57). Petition for rehearing was denied January 24, 1933 (R. 59). Petition for certiorari was filed April 22, 1933. Certiorari was granted May 29, 1933 (R. 61).

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Act of June 21, 1906, c. 3504, 34 Stat. 325, 363, removed the restrictions upon the alienation of the allotted land of a Kickapoo Indian who resided in Mexico at the time of and after the passage of that Act.

2. Whether the said Act of June 21, 1906, removed the restrictions upon the alienation of the inherited land of a Kickapoo Indian who *at the time of the inheritance, and at all times thereafter,* was a resident of the United States.

STATUTES INVOLVED

The pertinent provisions of the Act of June 21, 1906, c. 3504, 34 Stat. 325, 363, read as follows:

> All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: *Provided,* That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding

five years: *Provided further,* That the parent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said minor as herein provided, except that no such lease shall extend beyond the minority of said allottee.

Other statutory provisions bearing upon the questions presented will be referred to in the argument.

STATEMENT

This suit was brought by the United States to enjoin and restrain the respondent from interfering with the leasing and managing of, and from trespassing upon, certain Indian lands held in trust by the United States (R. 1, 3). The bill of complaint alleged that the United States was the owner of a certain quarter section of land located in Pottawatomie County, Oklahoma, which land was held in trust for the benefit of the heirs of Wah-puck-we-che, a deceased allottee of the Mexican-Kickapoo Tribe of Indians; that on October 18, 1930, the United States, through the Indian Superintendent, leased the land in question to one Craig, who entered thereupon and was in possession thereof; that the respondent, claiming some right in the land, had filed a suit for an injunction in a State court against the Superintendent and the lessee, seeking to enjoin them from exercising any right with respect to the leasing, managing, or possession of the land; that the respondent had unlawfully entered upon and was trespassing upon the land;

and prayed that the respondent be enjoined from interfering with the leasing and managing thereof by the United States (R. 1, 3).

The respondent filed an answer (R. 6, 11), in which he alleged that on May 20, 1930, he had purchased the land from Wa-pe-com-e, the sole heir of Wah-puck-we-che. The answer set forth a deed from Wa-pe-com-e (R. 11–12) and alleged that the deed was valid and that Wa-pe-com-e had the right to convey the land to the respondent. The answer admitted the alleged interference by the respondent with the leasing, managing, and possession of the land (R. 6, 10).

After trial the District Court made findings of fact and conclusions of law (R. 47, 48). The court found that the land in question was allotted to Wah-puck-we-che as a member of the Kickapoo Tribe of Indians; that the said allottee died in January 1929, and that Wa-pe-com-e, her only son and heir, inherited the land; that Wah-puck-we-che and Wa-pe-com-e left Oklahoma and went to Mexico in 1903; that both of said Indians were then adults and resided in Mexico many years and after the passage of the Act of June 21, 1906; that Wa-pe-com-e returned to the United States in the year 1920, and has resided in the United States since that date; that Wah-puck-we-che returned to the United States in 1927 and died in Oklahoma, but was a resident of Mexico at the date of her death; that on May 20, 1930, Wa-pe-com-e, as the sole heir

of Wah-puck-we-che, conveyed the land to the respondent Reily (R. 47, 48).

The District Court also found that the United States Superintendent of the Shawnee Indian Agency leased the land in question to Craig, on October 8, 1930, on behalf of the undetermined heirs of Wah-puck-we-che and that the respondent had obtained a permanent injunction in the District Court of Pottawatomie County against the Superintendent and Craig, restraining and enjoining them from interfering with respondent's possession of the land; that thereafter he filed suit in the Superior Court of Pottawatomie County and obtained a judgment quieting his title in and to said land against any claims of the said Wa-pe-com-e (R. 47, 48).

Upon this finding the District Court held that upon the death of Wah-puck-we-che, Wa-pe-com-e became vested with power to convey the land free from any supervision by the United States, and that the deed from Wa-pe-com-e to the repondent conveyed to the latter a good title. The District Court thereupon ordered that the bill of complaint be dismissed, and decreed that the United States and those on whose behalf the bill of complaint was brought had no right or interest in the land (R. 48). Upon appeal the decree of the District Court was affirmed by the Circuit Court of Appeals (R. 57) and thereafter a petition for a rehearing was denied (R. 59).

SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the land in question was free from the statutory restrictions against its alienation at the time of its alleged conveyance to the respondent;

(2) In holding that upon the death of the allottee, the sole heir, Wa-pe-com-e, became vested with full and unrestricted power to convey the land to the respondent;

(3) In affirming the decree of the District Court.

SUMMARY OF ARGUMENT

I

The Act of June 21, 1906, did not operate to remove the restrictions upon the alienation of the allotted lands, and the allottee as such could no more sell or encumber the same "after" than she could have done "prior" to the passage of said Act.

II

The Act of June 21, 1906, did not operate to remove restrictions upon the alienation of the inherited lands unless the heir was a nonresident of the United States at the time of the allottee's death, or became such a nonresident of the United States thereafter.

III

The repealing Act of February 17, 1933, c. 97, 47 Stat. 819, has no application to the controversy involved in this case.

ARGUMENT

I

THE ACT OF JUNE 21, 1906, DID NOT OPERATE TO REMOVE THE RESTRICTIONS UPON THE ALIENATION OF THE ALLOTTED LANDS, AND THE ALLOTTEE AS SUCH COULD NO MORE SELL OR ENCUMBER THE SAME "AFTER" THAN SHE COULD HAVE DONE "PRIOR" TO THE PASSAGE OF SAID ACT

The correct answers to the questions presented depend upon a correct interpretation of the Act of June 21, 1906. The pertinent provisions of that Act are quoted below for convenience (34 Stat. 363):

> *All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians,* and of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians *now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: Provided,* That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years: *Provided further,* That the parent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said minor as herein provided, except that no such lease shall extend beyond the minority of said allottee.

From an examination of the above quotation from the Act of 1906 it will be observed that the word "allottee" does not occur in the body of the Act, but is used only in the provisos. The body of the Act provides for the removal of "all restrictions as to sale and incumbrance of all lands, *inherited and otherwise*, of all adult Kickapoo Indians, * * * now or hereafter nonresident in the United States, who have been allotted land in Oklahoma", etc. The provisos, however, authorize the leasing of the allotments of Kickapoo Indian "allottees" who are nonresidents of the United States, under certain conditions. The inference from these provisos is no doubt that the restrictions are not removed in respect to the allotted lands while such lands are held by the original allottee, whether he or she be a nonresident of the United States or not. This construction is not inconsistent with the body of the statute, since both provisos and the body of the statute are susceptible of a harmonious construction, and in order to attain this result it is only necessary to construe the words "inherited and otherwise" used in the body of the statute, as not including lands held by the allottee at the time of the passage of the Act by virtue of an "allotment." The statute has been so construed in *Johnson* v. *United States*, 283 Fed. 954, where the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Lewis, said (p. 956):

> * * * when the whole paragraph is read with a view of sustaining it in all its parts the word "otherwise", in the second line, seems to be in contradistinction to allotment, so that it was clearly intended that all restrictions as to sale and incumbrance of lands, inherited or otherwise acquired (except allotments of surviving allottees), were removed under the conditions named.

Had the allottee Wah-puck-we-che attempted to convey her allotment prior to the passage of the Act of 1906 the conveyance would have been absolutely null and void in conformity with the agreement with the Kickapoo Indians ratified and confirmed by the Act of March 3, 1893, c. 203, 27 Stat. 557, and in accordance with the provisions of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, under which the said allotment was made (R. 26).

Section 5 of the General Allotment Act, *supra*, provides in part as follows (24 Stat. 389):

> And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

Now, if we are correct in our construction of the Act of June 21, 1906, the residence in Mexico of the allottee, Wah-puck-we-che, at the date of the passage of the said Act and for many years thereafter

until the time of her death, did not operate to remove the restrictions upon the alienation of her allotment. These restrictions were extended by Executive Orders of February 27, 1919, and June 14, 1924, until the year 1934 (R. 27); and had the said allottee attempted to convey her allotted lands at any time "after" the passage of said Act of 1906 her conveyance would also have been absolutely null and void. On the other hand, the death of Wah-puck-we-che, the [illegible], did not operate to remove the restrictions, for the restrictions, as has been repeatedly held by this Court, are not personal to the allottee but run with the land. *Bowling* v. *United States,* 233 U.S. 528, 535; *United States* v. *Noble,* 237 U.S. 74, 80.

II

THE ACT OF JUNE 21, 1906, DID NOT OPERATE TO REMOVE RESTRICTIONS UPON THE ALIENATION OF THE INHERITED LANDS UNLESS THE HEIR WAS A NONRESIDENT OF THE UNITED STATES AT THE TIME OF THE ALLOTTEE'S DEATH, OR BECAME SUCH A NONRESIDENT OF THE UNITED STATES THEREAFTER

As the restrictions were never removed during the lifetime of the allottee, Wah-puck-we-che, but were still in force at the time of her death, they continued to remain in force and bound the heirs as effectively as they did the original allottee. *Ewert* v. *Bluejacket,* 259 U.S. 129, 134. See also *Bowling* v. *United States, supra,* and *United States* v. *Noble, supra.*

This being so, the conclusion is unavoidable that Wa-pe-com-e, the heir, could not alienate the land

during the restrictive period any more than the original allottee, Wah-puck-we-che, unless, of course, it should be held that Wa-pe-com-e's residence in Mexico prior to his mother's death was sufficient under the Act of June 21, 1906, to remove the original restrictions. It is the Government's contention that the Act of 1906 cannot be so construed.

To hold that the Act of 1906 operated to remove the restrictions under the circumstances of this case, we submit, would clearly do violence to the plain meaning of the language used. There is nothing in the record of this case to show that upon or after the death of the allottee, Wah-puck-we-che, the status of the land was changed. Wa-pe-com-e was the sole heir, and although he had lived in Mexico with his mother until about 1920, he had returned in that year to the United States and was a resident of the United States at the time of his mother's death in January 1929, and has continued to reside in the United States ever since. As a matter of law, Wa-pe-com-e did not become an heir, that is, he did not acquire any interest by inheritance, in the land, until his mother died, as "no living person can have an heir" (18 C.J. 862); and, being a resident of the United States at that time and thereafter, the statute could not operate in his case for the reason that he has not been a nonresident of the United States at any time since his mother's death.

A fair construction of the Act of 1906 would require, we submit, that the heir should be a nonresident of the United States either at the time the inheritance vests in him or thereafter. The fact that Wa-pe-com-e went to Mexico and resided there with his mother for many years and after the passage of the Act of 1906 cannot affect the status of the land, not at least so long as his mother lived, since it was only upon her death that he acquired any vested interest in the land by way of inheritance. As at that time and ever since he has resided in the United States, the Act cannot be said to apply. The land then continued to be, and was at the time of the attempted conveyance by Wa-pe-com-e to the respondent Reily, subject to the restrictions, as it had been before, with the result that such a conveyance was and is absolutely null and void.

The Circuit Court of Appeals did not discuss the legal questions involved, but said (R. 56) that the instant case was not substantially different from that of *United States* v. *Estill*, 62 F. (2d) 620, a case which had just been decided by the Circuit Court of Appeals. In the *Estill case*, however, both the District Court and the Circuit Court of Appeals found as a fact that the Indian heirs in question resided in Mexico not only after the passage of the Act of June 21, 1906, but also *after they had inherited the land in question*, that is to say, after the death of the allottee. The Government does not

question the correctness of the decision of the court below in the *Estill case* but contends that the two cases are distinguishable upon their facts. In the *Estill case* the inheritance had already vested when the Act of June 21, 1906, was passed, and the heirs were nonresidents of the United States on that date and thereafter. In the instant case the heir, Wa-pe-com-e was a resident of the United States at the time of his mother's death, that is to say, at the time the inheritance vested in him, and has continued to be such at all times thereafter. When properly read the statute removes the restrictions only when the inheritance has vested, and the heir is or becomes a nonresident of the United States at that time, or at any time thereafter. This construction of the statute is in harmony with the rule that doubtful legislation is to be construed in favor of the Indians. *Worcester* v. *Georgia*, 6 Pet. 515, 562; *United States* v. *Celestine*, 215 U.S. 278, 290. It is the only construction which would give to this statute any meaning consistent with general principles of law and the Indian policy of the United States.

When this statute is examined in the light of its history, as may be gathered from committee reports and the debates in Congress upon the same, the conclusion seems inevitable that the main purpose of Congress in enacting this legislation was merely to permit such of the Kickapoo Indians as had *permanently taken up their residence in Mex-*

ico to sell all the lands in Oklahoma, acquired by them from the Indians through inheritance, devise, gift, or otherwise, thus excluding from the operation of the Act the lands individually allotted to them, and in the meantime to allow the leasing of such allotted lands under governmental supervision. Unfortunately the language used by Congress to accomplish this purpose was not well chosen, making the intention obscure. The following quotations are taken from the debates in Congress while the bill, which subsequently became the Indian Appropriation Act of June 21, 1906, was under discussion in the Senate:

> Mr. LODGE. I should like to ask the Senator in charge of the bill why is it not just as well to strike out those provisos? The Department wants to get rid of these Indians, and all the Senators on the committee have said it is desirable to get rid of the Indians. Why is it well to hold them on by these leases? Why not leave it absolutely free and strike out those provisos?
>
> Mr. CLAPP. I do not think the committee would have any objection to striking them out. I think they were put in there rather as a suggestion.
>
> The VICE PRESIDENT. Does the Senator from Massachusetts move to strike out the provisos?
>
> Mr. LODGE. Yes; I move to strike out the two provisos.
>
> The VICE PRESIDENT. The amendment of the Senator from Massachusetts will be stated.

The SECRETARY. After the word "removed," in line 13, page 104, strike out the colon and insert a period, and strike out the remainder of the paragraph.

Mr. MCCUMBER. Mr. President, I shall have to object to that amendment to the amendment for reasons that appear plain to me. A number of these Indians are going over to Mexico. We do not always know exactly what influence is being brought to bear upon them in order to gain their consent to change their domicile. It is not always easy to ascertain whether or not an absence of a month or two months or six months or even a year amounts to a change of residence. No time is given, and it seems to me that it will be better to allow this restriction to remain until we become certain that the Indian has changed his residence. I greatly fear that the mere absence of an Indian will be taken as a basis for some designing person who wants his land to secure a deed. I hope the provisos will remain in the bill until we can give it further consideration.

* * * * *

Mr. LODGE. I withdraw the motion to strike out those provisos. (Cong. Rec., Vol. 40, Pt. 6, pp. 5790–5791.)

Under the circumstances the Act of June 21, 1906, requires judicial interpretation, and, in view of the rule referred to above that doubtful legislation should be construed in favor of the Indians, a

certain amount of latitude, we submit, should be allowed so as not to permit the obscurity and inaptness of the language used to entirely obliterate the actual intention of Congress in enacting this law, as indicated above. But, aside from this, when the Act itself is read, without the aid of any extrinsic evidence as to the actual intention of Congress, with the purpose of giving effect to all of its provisions, the construction contended for by the Government is the correct one, and should, we submit, be adopted.

III

THE REPEALING ACT OF FEBRUARY 17, 1933, C. 97, 47 STAT. 819, HAS NO APPLICATION TO THE CONTROVERSY INVOLVED IN THIS CASE

Respondent has called attention to the Act of Congress approved February 17, 1933, c. 97, 47 Stat. 819, contending that by repealing the statute here involved Congress has "recognized" that all "titles" such as the one claimed by him were valid under said statute. (See Respondent's brief objecting to granting writ of certiorari, p. 4.)

Such contention, we submit, is clearly untenable. The Act of February 17, 1933, *supra*, provides as follows (47 Stat. 819):

> That the paragraph relating to the sale and encumbrance of lands of the Kickapoo and affiliated Indians under the heading "Kickapoo" (34 Stat. L. 363) in the Act entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty

stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1907," approved June 21, 1906, as amended, is hereby repealed.

SEC. 2. All restrictions upon said lands, which were removed by operation of said Act are hereby reimposed for a period of ten years from the date of the approval of this Act on all of such lands as are still held or owned by the Indians: *Provided, however,* That valid encumbrances now resting against any of said lands shall not in any manner be affected by the provisions of this Act, but any of such lands so encumbered, if still owned by the Indians, shall, when such encumbrances have been removed, become subject to the provisions of this Act as fully and to the same extent as if such lands were now unencumbered: *Provided further,* That the President may, in his discretion, in accordance with existing law, further extend the period of restriction herein provided for.

A careful examination of the above provisions will disclose that the purpose and policy of the Act of 1933 is threefold, namely: (1) to repeal the Act of 1906 insofar as it relates to the sale and encumbrance of lands of the Kickapoo and affiliated Indians; (2) to reimpose all restrictions upon said lands, which were removed by the operation of said Act of 1906 for a period of ten years or longer, in the discretion of the President, on all of such lands as are still held or owned by the Indians; and (3)

to confirm "valid encumbrances" resting against any of said lands now held or owned by said Indians.

As to the repealing part of the Act, it is not seen by what process of reasoning or rule of construction the respondent has arrived at the conclusion that by such repeal Congress has "recognized" his pretended "title" to the land involved, since the effect of a repealing statute is to revive the law as it stood before the passage of the statute repealed, *United States* v. *Philbrick*, 120 U.S. 52; and in the instant case, under the former law, the deed of conveyance upon which respondent bases his title to the land involved would be absolutely null and void. (See *supra*, pp. 9–11.) As to the other parts of the Act, it is clear that they are not intended to validate or "recognize" conveyances not otherwise authorized by the Act of 1906, nor by legislation prior thereto, such as the purported conveyance here involved.

As stated above, the Act of 1933 merely confirms "valid encumbrances" resting against lands of Kickapoo and affiliated Indians *held or owned by them at the time when such statute was passed.*

Whether the Act of 1933 has any application to the instant case depends, we submit, upon whether or not the deed of conveyance in question is a "valid encumbrance" within the meaning and intent of said Act. We submit it is not.

Prior to the Act of 1906 neither the allottee, Wah-puck-we-che, nor her heir, Wa-pe-com-e, could have

alienated this land, and any deed that might have been executed by either of them would have been absolutely null and void. (See *supra*, pp. 9–11). As the deed of conveyance upon which the respondent bases its title to the land involved was executed by Wa-pe-com-e subsequent to the passage of the Act of 1906, the question of the validity of said deed obviously depends upon whether or not the said Act operated to remove the restrictions upon the land. If it did, then the said deed of conveyance is valid; otherwise not.

Generally speaking, however, that is the very question presented for decision in this case (*supra*, p. 2), and we see therefore no useful purpose in pursuing the discussion of this aspect of the matter any further. We desire to add, however, that there is nothing in the Act of 1933, nor in the Committee reports of both Houses of Congress relating to this legislation, which even remotely suggests any intention on the part of Congress to validate or "recognize" any pretended title to lands of Kickapoo Indians based on a deed such as the one here involved, which purports to be not merely an encumbrance resting against the land involved but an outright conveyance of the entire title thereto, not authorized by the Act of 1906 nor by pre-existing legislation relating to the lands of Kickapoo Indians, and which is, therefore, as already seen, absolutely null and void.

CONCLUSION

In view of the foregoing considerations, it is submitted that the decision and decree of the Circuit Court of Appeals should be reversed, with directions to the District Court to enter a decree for the Government declaring null and void the conveyance and the State court judgments in question and cancelling the same; quieting the title to the land in the plaintiff as trustee for the heir of the deceased allottee, Wah-puck-we-che, against the claims, demands, and pretensions of the defendant, F. H. Reily, and enjoining and restraining the said defendant, F. H. Reily, from setting up and asserting any right, title, or interest in the land involved, or interfering with the leasing and managing of, and from trespassing upon the same.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
GEORGE C. SWEENEY,
Assistant Attorney General.
PEDRO CAPÓ-RODRÍGUEZ,
Attorney.

SEPTEMBER 1933.

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